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EX PARTE OR LATE FILED

Bell Atlantic

Ex Parte

April 11, 2000

Ms. Magalie Roman Salas
Secretary
Federal Communication Commission
445 12th Street, SW
Washington, D.C. 20554

Re: CC Docket No. 96-98/ Implementation of the Local Competition Provisions of the Telecommunications Act of 1996

Dear Ms. Salas:

On April 7, Mr. F. Gumper and I, representing Bell Atlantic, met with Mr. J. Jennings and Ms. J. Donovan-May of the Policy Division of the Common Carrier Bureau. The purpose of the meeting was to review Bell Atlantic's position in the above referenced proceeding and to respond to several points raised by other parties in this proceeding. The attached letter to Mr. Larry Strickling, Chief, Common Carrier Bureau, amplifies upon Bell Atlantic's position and addresses alternatives raised by MCI Worldcom and the Association for Local Telecommunications Services.

This written ex parte presentation is being submitted in accordance with Section 1.1206(a)(1) of the Commission's rules.

Sincerely,

Susanne Guyer

cc: Mr. L. Strickling
Mr. J. Jennings
Ms. J. Donovan-May

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April 11, 2000

Mr. Larry Strickling
Chief, Common Carrier Bureau
Federal Communications Commission
445 12th Street, SW – Room 5-C450
Washington, DC 20554

Re: CC Docket No. 96-98: Implementation of the Local Competition Provisions of the Telecommunications Act of 1996

Dear Mr. Strickling:

The February 29, 2000 *ex parte* letter, filed by a coalition of CLECs and ILECs representing a cross section of interests ("Joint *Ex Parte*"),[1] proposed a clarification of the Third Report and Order and the Supplemental Order with respect to the specific circumstances under which a requesting carrier may purchase loop/transport combinations. That proposal is fully consistent with, and gives definition to, the Commission's express conclusion that carriers "may not convert special access services to combinations of unbundled loops and transport network elements" unless that carrier provides "a significant amount of local exchange service." Supp. Order, ¶¶ 4, 5.

In contrast, recent *ex partes* filed in opposition to the Joint *Ex Parte* propose alternatives that are inconsistent with the Commission's orders, and would both alter the status quo and undermine competition in the special access market. The Commission should reject those alternative proposals.

1. The Joint *Ex Parte* Is Fully Consistent With The Commission's Orders. The Commission cited two different paths that a carrier could use to demonstrate "significant" local exchange service. Both of those paths were identified in the joint *ex parte* and are not reflected in other parties' proposals.

First, consistent with the specific requirements of the Supplemental Order (n. 9), the Joint *Ex Parte* proposes to allow requesting carriers to obtain combinations of unbundled loops and transport when the requesting carrier is the exclusive provider of an end user's local exchange service.

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[1] Signatories to the Joint *Ex Parte* included representatives of Intermedia Communications, Time Warner Telecom, Focal Communications, Winstar Communications, Bell Atlantic, BellSouth, GTE, SBC, and US West.

Second, consistent with an earlier *ex parte* filed jointly by Bell Atlantic and a cross section of competitors that was cited with approval in the Supplemental Order, the Joint *Ex Parte* proposes to allow combinations of unbundled loops and transport where a carrier handles at least one-third of an end user customer's local traffic -- measured as a percent of total end user customer local dialtone lines so long as the active channels and the entire facility are actually being used to provide some measurable amount of local voice traffic (as low as five percent). Normally, a customer would have only one or two local service providers at a location. Yet, under this definition, a third carrier could still meet the threshold of providing a significant amount of local exchange service.

Third, the Joint *Ex Parte* provides an additional alternative for situations where a small competitor may not have captured a significant amount of the customer lines, but where at least half the traffic handled by that carrier is local voice traffic. While that carrier may not be providing a "significant" amount of the customer's local service, the fifty percent threshold means that the local service provided is a "significant" part of the service provided by that carrier.

2. Other Proposals Are Inconsistent With The Commission's Orders. In contrast to the Joint *Ex Parte*, ALTS and MCI WorldCom argue for alternative tests that appear designed to disrupt special access competition.[2] Not surprisingly, these proposals also deviate from the requirements of the Third Report and Order and the Supplemental Order.

Rather than focus on significant local exchange service, as required by the Orders, ALTS would allow carriers to purchase combinations based on their providing *data* services to a customer with no distinction whether the services are truly local or not. Moreover, the ALTS proposal has no local voice requirement, so a carrier could provide *none* of the local voice dialtone service for a customer, and still qualify under the ALTS test. This is inconsistent with the Commission's orders.

In addition, as Bell Atlantic has previously explained, a carrier meeting the tests of the Joint *Ex Parte* is not precluded from using qualifying unbundled facilities to provide data services. For example, under Joint *Ex Parte* option two, a qualifying facility (where a carrier provides at least one third of a customer's local dialtone lines) may be converted if as little as 5 percent of the traffic on half of the activated circuits is local voice traffic and 10 percent of the traffic on the facility as a whole is local voice traffic. There are no restrictions on the remainder of that traffic. This still allows a carrier to purchase of combinations of unbundled loops and transport when the vast majority of its traffic for a particular customer is data. Indeed, the coalition supporting the Joint *Ex Parte* includes CLECs that provide substantial non-local data services.

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[2] *See* Letter from Jonathan Askin, on behalf of the Association for Local Telecommunications Services, to Magalie Salas, Secretary, Federal Communications Commission, CC Docket No. 96-98 (filed March 24, 2000); Letter from Chuck Goldfarb, on behalf of MCI Worldcom, to Larry Strickling, Chief, Common Carrier Bureau, Federal Communications Commission, CC Docket No. 96-98 (filed April 4, 2000).

MCI goes even further, arguing that when another provider serves 90 percent of a customer's local exchange business, a second provider can still qualify as "significant' local exchange provider for that customer with just the remaining ten percent. But that ignores the clarification provided by the Commission in footnote 9 of the supplemental order (citing the ways a carrier could be found to have provided "significant" local exchange service). "Webster's defines the adjective 'significant' as 'deserving to be considered: IMPORTANT, WEIGHTY, NOTABLE.'" *USA v. Walker*, 202 F.3d 181, 185 (3rd Cir. 2000) (quoting Webster's Third New International Dictionary Unabridged 1007 (1966)). Under MCI's definition, ten different carriers could be significant local service providers *to the same customer*. It is unreasonable to suggest that each of these providers are weighty or important providers of local service. Elsewhere the Commission has used the ten percent level to define the threshold for "de minimis" interstate special access service usage, hardly the measure for "significant." *See, e.g., GTE Telephone Operating Companies*, 13 FCC Rcd 22466, 22473 (1998).

MCI also urges the Commission to create an "irrebutable presumption" that any circuit connected to a port on a Class 5 switch (or its equivalent) is used exclusively to provide local service. Even apart from the fact that MCI does not define what an "equivalent" switch might include, it makes no effort to justify any such presumption. There is no basis to assume (much less irrebutably) that every circuit that terminates in a Class 5 switch is being exclusively used for local dialtone traffic. Moreover, for circuits that are multiplexed up into larger capacity facilities, there may be no way to determine whether an individual line actually terminates into a particular switch. By not limiting their proposal to dialtone lines, MCI opens the door for any type of line to qualify as local exchange traffic, regardless of its actual use.

Some parties have also objected to the inclusion of audit rights in the Joint *Ex Parte* proposal.[3] But these rights are limited and include safeguards against abuse. Because audits must be funded by the local exchange carriers themselves and they only obtain reimbursement where a violation is found, the local carriers have a built in incentive to use their audit rights only in those limited situations where they have a strong concern that the rules are not being adhered to. If the Commission nonetheless has concern that such audit rights would be abused, it could require that local exchange carriers send a copy to the Commission when they notify a purchaser of unbundled combinations that they are exercising those rights. This would allow the Commission to monitor the frequency and basis for audits. Some parties argue that they do not have the records called for in the Joint *Ex Parte*. Those carriers must have *some* records on which they based their certification that they meet the test for local use or these certifications are of questionable validity. Such carriers are free to negotiate alternative audit requirements based on those records that they do have.

MCI also criticizes the collocation requirement, but as Bell Atlantic has previously explained, such a requirement is clearly included in the current orders. *See* Bell Atlantic ex

[3] While MCI argues for alternative audit rules based on its own flawed definition of "significant," it does recognize the need for audit rights.

parte letter filed March 14, 2000 (a copy of which is attached hereto). MCI acknowledges that a collocation requirement is included in the Third Report and Order, but argues that the requirement was altered by the terms of the Supplemental Order. This can not be the case because the Supplemental Order does not even address collocation. MCI does not explain how an order that was explicitly designated to *preserve* the status quo in the special access market and remedy a concern that the restrictions in the Third Report and Order were being read in *too limited* a fashion, could be twisted into an interpretation which removes one of the most significant safeguards that was included in that order.

If collocation were not required, the results would be devastating to special access competition. Because any stand-alone loop may be converted to an unbundled network element, carriers could attempt to convert all channel terminations and to connect these facilities to special access services. That result would be exactly the result that the Commission sought to avoid in the Supplemental Order – a complete undermining of the competitive special access market.

Similarly, if carriers could connect unbundled facilities that qualified under the significant local definitions to a special access circuit, they could combine qualifying facilities with non-qualifying facilities and eviscerate the significant local requirement. In addition, if the Commission were to take the further step, as advocated by MCI, and allow carriers to "ratchet" – reducing the price of the special access service in proportion to the number of facilities feeding into that service that qualify as unbundled elements – the Commission would essentially be creating a new type of hybrid service and facility leasing that does not otherwise exist, could not be provisioned under existing billing systems, has never before been required, and cannot be justified under the Act.[4]

Carriers with extra capacity on their special access facilities are not harmed by an inability to use up that capacity by connecting to unbundled network elements. Such carriers have made the determination that the cheaper unit cost of the higher capacity service is financially beneficial despite the potential of unused circuits. There is no need to guarantee that carriers may fill these circuits to capacity even when they do not have the special access demand to support such a claim. If carriers seek to benefit from unbundled element prices, they may take the alternative of buying less special access services and making full use of unbundled combinations where they qualify. There can be no justification for giving them the best of both worlds and allowing them to use their spare special access capacity to carry traffic from and to unbundled network elements at

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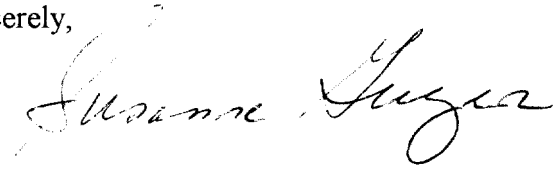
[4] Indeed, MCI recent voluntarily dismissed a complaint in which it claimed that it was entitled to such commingling. *See MCI Telecommunications v. Bell Atlantic*, File No. E-98-33, Order (rel. Mar. 30, 2000). In that dismissal MCI recognized that this was an issue closely tied to this rulemaking and MCI forswore damages for not receiving such commingled combinations in the past. In its recent *ex parte*, however, MCI attempts to recover those same damages by calling them backdated discounts, which it claims it is entitled to recover back to the time of an original request for collocation. There is no basis for such a requirement and the Commission should reject this MCI claim as well.

unbundled element rates. To rule otherwise would remove any remaining incentive to buy pure special access and undermine a workably competitive market.

As both CLECs and ILECs have urged, the Commission should not undermine the competitive special access market by adopting new rules that allow the wholesale conversion of special access circuits to unbundled network elements. Instead, it should adopt the proposal in the Joint *Ex Parte* and clarify the existing restrictions.

Please call me if you have any questions concerns regarding our proposal.

Sincerely,



cc: Mr. R. Atkinson
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